LIBRARY
SUPREME COURT, U. S.

Office-Supreme
FILE
JUN 13
JOHN F. DAVIS

Supreme Court of the United States

October Term 1969

No. 241

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased, and Individually as the Widow and next of kin of WILLIAM CURRY, deceased,

Petitioner,

against

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD., (also operating as P. D. MARCHESSINI & CO., New York, Inc.),

Respondents,

against

ATLANTIC STEVEDORING CO., INC.,

Third-Party Respondent,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER
Attorney for Petitioner
15 Park Row
New York, N. Y. 10038
BA 7-2618

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Facts of the Case	3
Reasons for Granting the Writ	4
Argument	5
Conclusion	7
Appendix:	
Opinion and Order of McLean, *D. J.*	1a
Judgment of Affirmance	4a

Cases Cited

Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S. Ct. 501	4
Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S. Ct. 1317	3n
Goett v. Union Carbide Co., 361 U.S. 340	5
Hess v. U. S., 361 U.S. 314	5, 6
Kuhn v. City of New York, 274 N.Y. 118, 8 N.E. 2d 300	4
Just v. Chambers, 312 U.S. 383, 61 S. Ct. 687	4
O'Leary v. United States Line Company, 215 F. 2d 708	4n
Riley v. Agwilines, Inc., 296 N.Y. 402, 73 N.E. 2d 718	4

PAGE

The Harrisburg, 119 U.S. 199, 7 S. Ct. 140 2

The John G. Stevens, 170 U.S. 113, 18 S. Ct. 544 .. 5

The M/V Tungus v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503 ..... 2, 3, 3n, 4n, 5, 6

United N. Y. & N. J. Sandy Hook Pilot's Ass'n v. Halecki, 358 U.S. 613, 79 S. Ct. 517 ..... 5, 6

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368 5

Statutes Cited

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 4

28 U.S.C. § 1333(1) 4

28 U.S.C.A. § 1333(1) 4

Supreme Court of the United States

October Term, 1968

No. .....

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased, and Individually as the Widow and next of kin of WILLIAM CURRY, deceased,

Petitioner,

against

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD., (also operating at P. D. MARCHESSINI & Co., New York, Inc.),

Respondents,

against

ATLANTIC STEVEDORING CO., INC.,

Third-Party Respondent,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 16, 1969.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (McLean, D.J.) is reported at 274 F. Supp. 167 (1967), and is printed in full as part of the appendix to this petition.

The United States Court of Appeals for the Second Circuit affirmed without opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 16, 1969. The jurisdiction of this Court is involked under 28 U.S.C. § 1254 (1).

An extension of time until June 14, 1969 to file the within petition for a writ of certiorari was granted by Mr. Justice Harlan by order dated April 8, 1969.

Questions Presented

Is it the responsibility of our Federal Courts to fashion rules of substantive law in fatal maritime cases, or is the remedy for damages for wrongful death dependent upon the exegesis of the statute of each State?

Has the principle of maritime law established by the Court of Appeals in the case of *The Harrisburg,* 119 U.S. 199, 7 S. Ct. 140, kept apace with the advancement of the maritime industry, modern technology, the utilization of third party, including stevedoring services and insurance protection, so as to justify its continuation, or should our Admiralty Courts exercise their extensive responsibility of fashioning rules of substantive law which are primarily judge made law, as held in the case of *The M/V Tungus* v.

Skovgaard, 358 U.S. 588, 79 S. Ct. 503 [1], and reverse such holding [2] so as to eliminate situs of accident as a determining factor as to remedial rights for fatal maritime accidents?

Facts of the Case

The subject matter of the action was the wrongful death of William Curry, who was fatally injured on the 30th day of October, 1960, while working as a longshoreman on board the respondents' vessel *S.S. Eurylochus,* which was docked at a pier in Georgia. A broken band on a piece of cargo which was being hoisted caught the decendent's trouser, lifted him into the air and swung his body head down against the side of the ship, causing him to suffer fatal injuries.

District Judge McLean on the 8th day of June, 1967 granted respondents' motion for judgment on the pleadings on the basis that the action was barred by the two year Georgia statute of limitations, on the authority of *Tungus* v. *Skovgaard,* 358 U.S. 588, 79 S. Ct. 503.

---

[1] Dissenting opinion by Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas join, concurring in part and dissenting in part, the Court stating at page 516:

> "Admiralty law is primarily judgemade law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314, 75 S. Ct. 368, 370, 99 L. Ed. 337; cf. The John G. Stevens, 170 U.S. 113, 126-127, 18 S. Ct. 544, 549-550, 42 L. Ed. 969. This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational. Admiralty law is an area where flexibility and creativity have been demonstrated in accomplishing this."

[2] The Supreme Court will not hesitate to exercise its discretion in considering changes that have taken place since a prior decision which justify its overruling its own prior decision. See: Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S. Ct. 1317, 1323.

The action was commenced on March 3, 1964. Jurisdiction was based on diversity of citizenship of the parties (28 U.S.C. § 1332).

Reasons for Granting the Writ

There is a conflict of decision as to whether the holding of the United States Supreme Court in the cases of *Just* v. *Chambers*, 312 U.S. 383, 61 S. Ct. 687, *Ghelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 38 S. Ct. 501, *Kuhn* v. *City of New York*, 274 N.Y. 118, 8 N.E. 2d 300 and *Riley* v. *Agwilines, Inc.*, 296 N.Y. 402, 73 N.E. 2d 718, which, in substance, held that State law afforded redress for maritime torts which resulted in death within the concept of the Saving Clause, 28 U.S.C. § 1333 (1), 28 U.S.C.A. § 1333 (1), to be recognized as essentially federal in their source and uniform in their application[3], to be administered as federal substantive law[4] and the contrary holdings that death claims based on breach of warranty of seaworthiness cannot be maintained unless federal law adopts an existing State death statute together with all ifs limitations, as held

---

[3] ". . . it has long been settled that a state-created remedy for wrongful death will be enforced both in the admiralty courts and in proceedings under the saving clause when death results from a tort committed on navigable waters within a state whose statute provides such a remedy. The Hamilton, 1907, 207 U.S. 398, 28 S. Ct. 133, 52 L. Ed. 264; Western Fuel Co. v. Garcia, 1921, 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210; American Stevedpres v. Porello, 1947, 330 U.S. 446, 67 S. Ct. 847, 91 L. Ed. 1011, and the cases cited therein. See also the discussion in Just v. Chambers, supra." (O'Leary v. United States Line Company, 215 F. 2d 708, 711);

[4] "6. Judge Learned Hand's opinion in Guerrini v. United States, 2 Cir., 167 F. 2d 352, 354, took the view that the New York cases were decided as compelled by the federal law, as is amply evident from the opinions themselves." (The M/V Tungus v. Skovgaard, supra, p. 513);

in *The M/V Tungus* v. *Skovgaard*, supra; *United N.Y. & N.J. Sandy Hook Pilot's Assn.* v. *Halecki*, 358 U.S. 613, 79 S. Ct. 517; *Goett* v. *Union Carbide Co.*, 361 U.S. 340; *Hess* v. *U.S.*, 361 U.S. 314.

Argument

Admiralty law is not a tomb of petrified judicial decisions so inexorable as to be incompassionate to the true administration of justice.

A proper uniformity on essential matters of maritime cognizance is so deep rooted in federal law that when several States provide remedies in a comparable and general way, such universal feature of the common law system offers a sufficient basis for the operation of general maritime law in treating with wrongful death cases.

The adoption by admiralty of States' Wrongful Death Acts "cum onere" not only destroys uniformity of decision in treating with fatal accidents under identical circumstances, but creates the additional result that remedial rights which are granted to some of our citizens are denied to others, solely on the basis of the place of the accident.

The remedial rights predicated on breach of warranty of seaworthiness did not exist under common law, nor is the right to redress based on any statutory enactment. The fact is that the right to recover damages for breach of warranty of seaworthiness is one created by federal courts and is primarily judgemade law. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368; *The John G. Stevens*, 170 U.S. 113, 18 S. Ct. 544.

Up to the present time, this Court has repeatedly held maritime law did not create a cause of action for wrongful death.

This Court has held that maritime accidents due to breach of warranty of seaworthiness constitute a basis for recovery of damages for personal injuries short of death, but not for fatal injuries.

In accidents resulting in fatal injuries, federal courts have adopted State Wrongful Death Acts, together with expressed statute limitations.

The result has been that uniformity of admiralty decision has been completely destroyed when redress is accorded to some and withheld from other citizens of our country, solely on the basis of situe of accident, and that a widow and children in one State receive protection under the law of admiralty, whereas a widow and children in another State are denied redress by a comparable court of admiralty.

This practice of granting remedial rights for wrongful death on the basis of the site of the accident seems to be repugnant to the American concept of fair and impartial justice administered equally to all under identical circumstances.

Time has proven that justice would best be served by adopting the views by many Justices of the Supreme Court in their dissenting opinions that admiralty would not adopt Wrongful Death State Statute but would put it aside to fashion its own remedy for wrongful death.

See dissenting opinions in *The M/V Tungus* v. *Skovgaard*, supra, dissenting opinion by Mr. Justice Brennan with whom Chief Justice Black and Mr. Justice Douglas joined, concurring in part and dissenting in part; *United N.Y. & N.J. Sandy Hook Pilot's Assn.* v. *Halecki*, supra, dissenting opinion by Mr. Justice Brennan with whom Chief Justice Black and Mr. Justice Douglas joined; *Hess* v. *U.S.* supra, dissenting opinion by Mr. Justice Harlan with whom Mr. Justice Frankfurter joined.

CONCLUSION

It is respectfully submitted the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner

(APPENDIX)

Opinion and Order of McLean, *D. J.*

This is an action by the administratrix of a longshoreman who resided in Georgia to recover damages for his death which occurred, allegedly because of the unseaworthiness of defendant's vessel and cargo, while he was loading the vessel in Savannah, Georgia. Jurisdiction is based on diversity of citizenship.

Defendant moves pursuant to Rule 12(c) for judgment on the pleadings on two grounds: (1) that the action is barred by the two-year Georgia statute of limitations; (2) that the Georgia wrongful death statute does not encompass an action for death caused by unseaworthiness. Since the first ground is valid, it is unnecessary to consider the second.

The action is expressly based upon the Georgia wrongful death statute (Ga. Code Ann. § 105-1302, 1309 (1956)), as it must be, for the maritime law recognizes no cause of action for wrongful death of a longshoreman which does not occur on the high seas.

The Tungus v. *Skovgaard*, 358 U.S. 588 (1959).

Since the right of action is created by state statute, the state statute of limitations applicable to the action governs.

Western Fuel Co. v. *Garcia*, 257 U.S. 233 (1921).

Georgia Code Annotated § 3-1004 (1956) provides:

> "Actions for injuries to the person shall be brought within two years after the right of action accrues. . . ."

The Georgia courts have construed this statute to apply to death actions.

> *Atlantic, V. & W.R. Co.* v. *McDilda,* 135 Ga. 468, 54 S.E. 140 (1906);
> *Chapman* v. *Central of Georgia Ry.,* 20 Ga. App. 251, 92 S.E. 1025 (1917).

Curry's death occurred on October 30, 1961. The right of action then accrued.

> *Atlantic, V. & W.R. Co.* v. *McDilda, supra;*
> *Chapman* v. *Central of Georgia Ry., supra.*

This action was not begun until March 3, 1964. It was therefore begun too late.

There is no merit to the arguments advanced by plaintiff in an effort to avoid the statutory bar. The statute was not tolled by defendant's absence from Georgia. Judge Cannella has found on an earlier motion in this action that defendant was doing business in Georgia at the time of the accident and was amenable to service there.

> *Curry* v. *P. D. Marchessini, Inc.,* 64 Civ. 663 (S.D. N.Y. May 11, 1965).

The Georgia tolling statute (Ga. Code Ann. § 3-805 (1956)) applies only when a defendant who resided in Georgia when the cause of action accrued later removes temporarily from the state.

> *Miller* v. *Rackley,* 199 Ga. 370, 34 S.E. 2d 438 (1945).

That is not the case here.

Ga. Code Ann. § 3-808 (1956) which permits a plaintiff to recommence an action within six months after a non-suit,

discontinuance or dismissal of his prior action has no application to this case. The earlier proceeding referred to by plaintiff in this connection, *O'Keeffe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965), was a proceeding brought on behalf of Curry's widow to obtain compensation for his death under the Longshoremen's and Harbor Workers' Compensation Act. It was not non-suited, discontinued or dismissed within the meaning of the Georgia statute. On the contrary, although the district court held that the claim did not come within the Compensation Act, the Court of Appeals reversed and awarded compensation to Curry's widow.

Defendant's motion for judgment on the pleadings is granted.

So ordered.

Dated: June 8, 1967.

EDWARD C. MCLEAN
U. S. D. J.

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-nine.

Present:

HON J. EDWARD LUMBARD,
Chief Judge,
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

MARGARET CURRY, as Administratrix of the Estate of William Curry, deceased,
Plaintiff-Appellant,

v.

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD. (also operating as P. D. MARCHESSINI & CO., NEW YORK, INC.),
Defendants and Third-Party Plaintiffs-Appellees,

ATLANTIC STEVEDORING CO., INC.,
Third-Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudgment, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

FILED
JUL 12 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 241

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased, and Individually as the Widow and next of kin of WILLIAM CURRY, deceased,

Petitioner,

—against—

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD. (also operating as P. D. MARCHESSINI & Co., New York, Inc.),

Respondents,

—against—

ATLANTIC STEVEDORING CO., INC.,

Third Party Respondent,

—and—

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALVIN L. STERN
Counsel for Respondents
37 Wall Street
New York, New York 10005

POLES, TUBLIN, PATESTIDES & STRATAKIS
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1527

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased, and Individually as the Widow and next of kin of WILLIAM CURRY, deceased,

Petitioner,

—against—

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD. (also operating as P. D. MARCHESSINI & Co., New York, Inc.),

Respondents,

—against—

ATLANTIC STEVEDORING CO., INC.,

Third Party Respondent,

—and—

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks review of an order of the United States Court of Appeals, Second Circuit (4a).* The aforesaid

---

* Note:—Reference to Petitioner's appendix will be designated by "a", and reference to Respondent's appendix will be designated by "A".

order affirmed a judgment of the United States District Court for the Southern District of New York (1a) (274 F. Supp. 167), wherein judgment on the pleadings was granted to respondents on the grounds that this action was barred by the two-year Georgia Statute of Limitations.

The action was brought under the Georgia Wrongful Death Statute (Ga. Code Ann. §§105, 1302, 1309 [1956]), which contains a two-year Statute of Limitations. It was commenced on March 3, 1964 in the United States District Court for the Southern District of New York by Margaret Curry as an Administratrix of the Estate of William Curry for injuries sustained by, and wrongful death to, William Curry which allegedly occurred on October 30, 1960 while he was employed as a longshoreman on board the S.S. "EURYLOCHUS".

Both the district court and the Court of Appeals, in accordance with well established doctrine and a long line of decisions of this Honorable Court, held that the action had not been timely brought (1a, 4a). In spite of this, and in spite of the continued reaffirmance by this Honorable Court of its decisions on this subject, petitioner seeks once again to have the matter reviewed.

In addition to the above, it should be pointed out that Margaret Curry, the plaintiff in this action, died on the 3rd day of September, 1968; that no substitution for her has ever been made; and that there has been no showing in this action of the existence of a party who could properly be substituted for her.

Prior to the filing of the petition seeking a Writ of Certiorari, an attempt was made to substitute Sidney L. Raskin, Executor of the Estate of Margaret Curry, as

party plaintiff. A motion was made to the United States District Court for the Southern District of New York. The Court, however, by order dated June 13, 1967, denied the motion stating that there had been no showing by the movant that the substitution sought was proper (A-1). The petition in this matter was therefore filed without a proper party plaintiff in existence and without the authority and consent of one who had standing to litigate.

Questions Presented

1. Whether this Honorable Court should overrule its prior decisions, and defeat the intent of Congress to preserve State sovereignty over deaths caused by maritime torts within the State's territorial waters?

2. Whether this Honorable Court should grant a Writ where there is no proper party plaintiff in existence and where the petition for Writ of Certiorari was filed without the authority or consent of one with standing to litigate?

Reasons for Denying the Writ

1. At the time of filing the petition seeking a Writ of Certiorari there was no proper party plaintiff in existence and the petition was filed without the authority or consent of one who had standing to litigate. It has long been the practice of this Honorable Court not to grant Writs of Certiorari in matters where there exists no standing to litigate and where there is no matter which is then justiciable.

2. Petitioner, furthermore seeks a Writ of Certiorari on a subject on which this Court has quite clearly spoken in the past. See *The Harrisburg,* 119 U. S. 199, 7 S. Ct. 140; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 42 S. Ct. 89; *Tungus* v. *Skovgaard,* 358 U. S. 588, 79 S. Ct. 503; *Goett* v. *Union Carbide Corporation,* 361 U. S. 340, 80 S. Ct. 357; *Hess* v. *U. S.,* 361 U. S. 314, 80 S. Ct. 341. No new reasons are put forth why this Honorable Court should reverse its prior holdings or why it should defeat the intent of Congress to preserve State sovereignty over deaths caused by maritime torts within the State's territorial waters. See S. Rep. No. 216, 66th Cong. 1st Sess. 3; H. R. Rep. No. 674, 66th Congress. Also see *Tungus* v. *Skovgaard, supra.* What appears to be petitioner's sole basis for seeking a Writ of Certiorari is that the adoption by admiralty of State's Wrongful Death Acts "cum onere" would somehow destroy uniformity. This argument was rejected by this Honorable Court in both *Tungus* v. *Skovgaard, supra,* and *Hess* v. *U. S., supra,* when the following was stated:

> "The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose. 358 U. S. at 593.
>
> Even Southern Pacific Co. v. Jensen, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U. S. 205, at 216. It would be an anomaly

to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. Caldarola v. Eckert, 332 U. S. 155. 358 U. S., at 594."

Petitioner, furthermore, seems to ignore the fact that state wrongful death statutes are not remedial in nature but created new legal liabilities, *The Harrisburg, supra,* and that there is nothing repugnant or unfair about letting a State treat *all* of its citizens with evenhandiness in the administration of a cause of action which it itself created.

Finally, it should be pointed out that in the past when there has been a need in maritime matters to enact federal death legislation, Congress has done so and not the Courts (e.g., Jones Act and Death on the High Seas Act).

In view of the above it is respectfully submitted that there has been no showing made by petitioner of any basis for the issuance of a Writ of Certiorari in this matter.

CONCLUSION

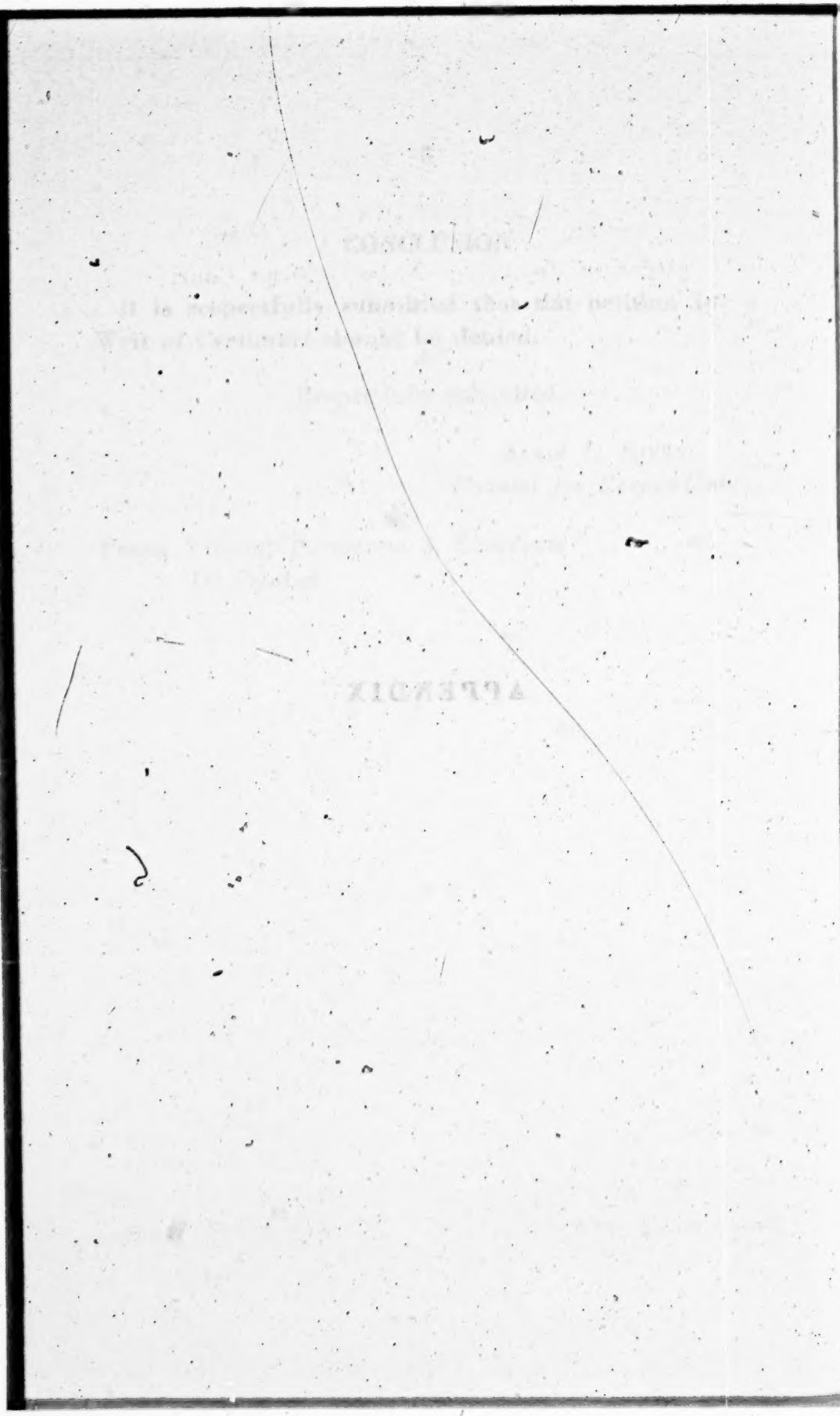
It is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALVIN L. STERN
Counsel for Respondents

POLES, TUBLIN, PATESTIDES & STRATAKIS
Of Counsel

APPENDIX



APPENDIX

Order of the United States District Court Southern District of New York

TENNEY, J.

This is a motion brought on by way of order to show cause seeking the substitution of Sidney L. Raskin, Executor of the Estate of Margaret Curry in place of Margaret Curry herself, now deceased, as party plaintiff herein. In reaching a determination, this Court is bound to follow the law of Georgia.

The Georgia statute which governs in this instance, that is, Ga. Code Ann. § 3-505 at 146 (1962) states that:

> ". . . [a] cause of action [wrongful death], in case of death of the plaintiff, shall, *in the event there is no right of survivorship in any other person,* survive to the personal representative of the deceased plaintiff. . . ." (Emphasis supplied.)

Therefore, where a wife sues for the homicide of her husband and dies during the pendency of the litigation, the action survives in the first instance to the children of the deceased, if any be in life. If there be no children, then the cause of action survives to the personal representative of the deceased plaintiff. *Keenan Welding Supplies Co.* v. *Bronner,* 100 Ga. App. 400, 111 S.E.2d 140 (Div. 1 1959); *Campbell* v. *Western & Atlantic R.R.,* 194 S.E. 927 (Div. 1 1938).

Inasmuch as there has been no showing by the movant herein that no children of William Curry exist to whom there would accrue a right of survivorship, the instant

motion is denied with leave to renew upon filing of proof that, in fact, no children do exist who have the right to pursue this cause of action.

So ordered.

Dated: New York, New York
June 13, 1969.

CHARLES H. TENNEY
U.S.D.J.

SUPREME COURT, U. S.
FILED
JUL 12 1969
F. DAVIS, CLE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. ~~241~~ -

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased and Individually as the Widow and Next of Kin of WILLIAM CURRY, deceased,

Petitioner,

against

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD. (also operating as P. D. Marchessini & Co., New York, Inc.),

Respondents,

against

ATLANTIC STEVEDORING CO., INC.,

Third-Party Respondent,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

BRIEF FOR THIRD-PARTY RESPONDENT, ATLANTIC STEVEDORING CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL M. SEMEL, Esq.,
Attorney for
Third-Party Respondent,
10 Rockefeller Plaza,
New York, N. Y. 10020.

JOHN NIELSEN,
of Counsel.

TABLE OF CONTENTS

	PAGE
Statement	1
Opinions Below	2
Facts	2
Questions Presented	3
Applicable Statutes	3
POINT I—The Court below properly dismissed the complaint	4
Conclusion	14

TABLE OF CASES

Allen v. U. S. (C. A. 9), 338 Fed. 2d 160 (1964)	9
Atlantic, V. & W. R. Co. v. McDilda, 135 Ga. 468, 54 S. E. 140	4
Chapman v. Central of Georgia Ry., 20 Ga. App. 251, 92 S. E. 1025	4
Chelentis v. Luckenbach S. S. Co., 247 U. S. 372	13
Continental Casualty Co. v. The Benny Skou. 200 F. 2d 246 (C. A. 4th Cir.)	7
Cramp v. Board of Education, 368 U. S. 278, 285	4
Cunningham v. Redirect Viadeggen A/S, 333 Fed. 2d 308 (1964)	8
Curry v. Fred Olsen Line (C. A. 9), 367 Fed. 2d 921 (1966) cert. den. 386 U. S. 971	11
Curtis v. A. Garcia y Cia., 241 F. 2d 30 (C. A. 3d Cir.)	7

PAGE

Davis v. Mills, 194 U. S. 451, 453 5

Feige v. Hurley, 89 F. 2d 575 (C. A. 6th Cir.) 7

Garner v. Louisiana, 368 U. S. 157, 166 4

Garret v. Moore-McCormack, 317 U. S. 239, 245 8

Goett v. Union Carbide Corp., 361 U. S. 340 .....9, 10, 12

Graham v. A. Lusi, Ltd., 206 F. 2d 223 (C. A. 5th Cir.) 7

Hess v. U. S., 361 U. S. 314 ..... 9, 12

Ivestor v. Southern Ry. Co., 61 Ga. App. 364, 6 S. E. 2d 214 4

Just v. Chambers, 312 U. S. 383 12

Klingseisen v. Costanzo Transp. Co., 101 F. 2d 902 (C. A. 3d Cir.) 7

Kuhn v. City of New York, 274 N. Y. 111 13

Kuhn v. City of New York, 274 N. Y. 118, 8 N. E. 2d 300 7

LaBourgogne, 210 U. S. 95 7

Lee v. Pine Oil Co., 218 F. 2d 711 (C. A. 6th Cir.) .. 7

Levison v. Dupree, 345 U. S. 648 ..... 6, 8

N.A.A.C.P. v. Button, 371 U. S. 415, 452 4

O'Brien v. Luckenbach S. S. Co., 293 F. 170 (C. A. 2d Cir.) 7

O'Keefe Dep. Commis. v. Atlantic Steved. Co., 354 Fed. 2d 48 3

O'Leary v. United States Lines Co., 215 F. 2d 708 (C. A. 1st Cir.) 7

Quinette v. Bisso, 136 F. 285 (C. A. 5th Cir.) 7

Riley v. Agwilines, Inc., 296 N. Y. 402, 73 ..... 7, 13

PAGE

Southern Pacific Co. v. Jensen, 244 U. S. 205 10

The A. W. Thomson, 39 F. 115 (D.C.S.D.N.Y.) 7

The H. S. Inc., No. 72, 130 F. 2d 341 (C. A. 3d Cir.) 7

The Hamilton, 207 U. S. 398 7

The Harrisburg, 119 U. S. 213 .....5, 6, 7, 14

The John G. Stevens, 170 U. S. 113 12

The Tungus v. Skovgaard, 358 U. S. 588 ..4, 6, 9, 10, 11, 14

United, N. Y. & N. J. Sandy Hook Pilot & Assn. v. Halecki, 1959, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 12

United New York and New Jersey Pilots Assn. v. Halecki, 251 F. 2d 708 (C. A. 2d Cir.) 7, 12

Western Fuel Co. v. Garcia, 257 U. S. 233.....4, 6, 7, 9, 10, 13, 14

Wilburn Boat Co. v. Firemen's Fund, 348 U. S. 310 .. 12

Williams v. Moran, Proctor, Mueser & Rutledge (S.D.N.Y.—Sugarman, J.), 205 F. Supp. 208 (1962) 9

STATUTES CITED

Sec. 105-1302, Book 29, Georgia Stats. Anno. 3

Sec. 3-1004, Book 2 3

Georgia Statute of Limitations § 3-1004 4

S. Rep. No. 216, 66th Cong. 1st Sess. 3 8

H. R. Rep. No. 674, 66th Cong. 2d Sess. 3 8

House of Representatives 59 Cong. Rec. 4482-4486 .. 8

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased and Individually as the Widow and Next of Kin of WILLIAM CURRY, deceased,

Petitioner,

against

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & Co., LTD. (also operating as P. D. Marchessini & Co., New York, Inc.),

Respondents,

against

ATLANTIC STEVEDORING CO., INC.,

Third-Party Respondent,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

BRIEF FOR THIRD-PARTY RESPONDENT, ATLANTIC STEVEDORING CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 16, 1969.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (McLean, D.J.) is reported at 274 F. Supp. 167 (1967), and is printed in full as part of petitioner's appendix to her petition (1a-3a).

The United States Court of Appeals for the Second Circuit affirmed without opinion.

Defendants' motion was predicated upon two grounds: (1) that the action was not timely brought, and (2) that it failed to state a cause of action as the Georgia death statute does not provide for a recovery based upon unseaworthiness.

The motion having been granted as to the first ground, no determination was made on the second ground.

Facts

The amended complaint alleges that on October 30, 1961, deceased, William Curry, employed in loading cargo aboard respondents' vessel, S.S. Eurylochus at Savannah, Georgia, sustained fatal injuries due to alleged unseaworthiness of personnel, gear and cargo aboard the vessel; that petitioner was, on January 13, 1964, appointed Administratrix by the Court of Ordinary for Chatham County, Georgia and that petitioner is a resident and citizen of Georgia; that petitioner sues for damages under the Georgia Death Statute.

It is undisputed that the instant action was commenced on March 3, 1964, more than 2 years after death, as pleaded in the ninth affirmative defense in respondent's answer.

Prior to the commencement of the instant action petitioner had made a claim for workmen's compensation under the Longshoremen's and Harbor Workers' Compensation

Act against deceased's employer, Atlantic Stevedoring Company, Inc., the third-party respondent herein and received an award which was thereafter vacated by the District Court (220 Fed. Supp. 881) as not being within the purview of that Act. On appeal to the U. S. Court of Appeals, Fifth Circuit, the order of the District Court was reversed 'for the entry of a judgment sustaining the award of the deputy commissioner" (*O'Keefe, Dep. Commis.* v. *Atlantic Steved. Co.*, 354 Fed. 2d 48).

Questions Presented

Was the action timely commenced? It is respondents' position that Judge McLean correctly held it was not timely commenced.

Applicable Statutes

Sec. 105-1302, Book 29, Georgia Stats. Anno.

> "Homicide of husband or parent.—A widow, or, if no widow, a child or children, minor or sui juris, may recover for the homicide of the husband or parent, the full value of the life of the decedent, as shown by the evidence."

Sec. 3-1004, Book 2:

> "Injuries to the person.—Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year."

POINT I

The Courts below properly dismissed the complaint.

The opinion of Judge McLean (1a-3a) is clear on the law.

This action is brought upon the Georgia Death Statute, set forth hereinabove, since the maritime law recognizes no action for wrongful death (*The Tungus* v. *Skovgaard*, 358 U. S. 588) and the federal courts are bound by the interpretation placed upon state statutes by the highest court of that state (*Cramp* v. *Board of Education*, 368 U. S. 278, 285; *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 432; *Garner* v. *Louisiana*, 368 U. S. 157, 166).

The Georgia statute of limitations of 2 years (§ 3-1004—hereinabove) has been held applicable to death actions by the Supreme Court of Georgia (*Atlantic, V. & W. R. Co.* v. *McDilda*, 135 Ga. 468, 54 S. E. 140; accord, *Chapman* v. *Central of Georgia Ry.*, 20 Ga. App. 251, 92 S. E. 1025; *Ivestor* v. *Southern Ry. Co.*, 61 Ga. App. 364, 6 S. E. 2d 214) and runs from the death of decedent (*Atlantic, V. & W. R. Co.* v. *McDilda, supra; Chapman* v. *Central of Georgia Ry., supra*), in the instant case, on October 30, 1961, more than two years before the commencement of this action.

This Court has held that such a limitation is binding when admiralty adopts such a statute.

In *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, the action was under the California Death Statute where a longshoreman was killed on August 5, 1916 aboard a vessel in San Francisco Bay, navigable waters of California. The action was commenced after the expiration of the one-year limitation period and, admittedly, the action would be barred if commenced in California courts, just as in the instant action the action would be barred in the Georgia courts.

In referring to its previous decision in *The Harrisburg*, 119 U. S. 213, this Court said (pp. 242-244):

"• • • Through Mr. Chief Justice Waite, this court said:

'The statutes create a new legal liability with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore, to be treated as limitations of the right.' See also *Davis* v. *Mills*, 194 U. S. 451, 453.

'An Act Relating to the maintenance of actions for death on the high seas and other navigable waters.' approved March 30, 1920, c. 111, 41 Stat. 537, gives a right of action for damages resulting from death caused by wrongful act, neglect or default occurring on the high seas beyond one marine league from the shore. It expressly directs, 'That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.'

> In the present cause the District Court rightly assumed jurisdiction of the proceedings, but erred in holding the right of action was not barred under the state statute of limitations. Accordingly, its judgment must be reversed and the cause remanded there with instructions to dismiss the libel."

This holding was restated by Justice Frankfurter in *Levinson* v. *Dupree*, 345 U. S. 648; at p. 651:

> "* * * Like the *Garcia* suit, the present libel was brought under a state wrongful death statute, Ky. Rev. Stat. 1946, § 411.130. As we held in *Garcia*, a time limitation deemed attached to the right of action created by the State is binding in the Federal forum. *The Harrisburg, supra*, 119 U. S. at page 214, 7 S. Ct., at page 147."

The same statement was made in *The Tungus* v. *Skovgaard*, 358 U. S. 588, in which the question was whether, in an action brought under the New Jersey Death Statute for death of one on a vessel at a pier in Bayonne, N. J., unseaworthiness could be the basis of an action. The statute, giving such action where death was caused by "wrongful act, neglect or default" was held broad enough to include unseaworthiness. This Court, in referring to an argument similar to appellant's here, stated, page 591:

> "The respondent asks us to uphold the interpretation which the majority of the Court of Appeals has put upon the New Jersey statute. Failing that, a much broader alternative argument is advanced—that a court in a case such as this may disregard completely the conditions which the State has put upon the right it has created, and may apply instead the full *corpus* of the maritime law, free of any qualifications imposed by the State. If death occurs upon navigable waters within a State, the argument runs, the law should seize only upon the blunt fact that there is

some kind of state statute providing some kind of a right of action for death caused by some kind of tortious conduct. That, it is said, is enough to fill the 'void' in the maritime law, which then becomes applicable in all its facets, without further inquiry as to what it is that the State has actually enacted.

This broad argument must be rejected. The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, *with whatever conditions and limitations* the creating State has attached. That is what was decided in *The Harrisburg*, where the Court's language was unmistakable: '. . . [I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . . *The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.*' 119 U. S. 199, at 214. That is the doctrine which has been reiterated by the Court through the years.[1] See *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95; *Western Fuel Co.* v.

---

[1] That this is the law has been generally understood by the other federal courts. *United New York and New Jersey Pilots Assn.* v. *Halecki*, 251 F. 2d 708 (C. A. 2d Cir.), judgment vacated and cause remanded, *post*, p. 613; *Continental Casualty Co.* v. *The Benny Skou*, 200 F. 2d 246 (C. A. 4th Cir.); *Graham* v. *A. Lusi, Ltd.*, 206 F. 2d 223 (C. A. 5th Cir.); *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 6th Cir.); *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (C. A. 3d Cir.); *The H. S. Inc., No. 72*, 130 F. 2d 341 (C. A. 3d Cir.); *Feige* v. *Hurley*, 89 F. 2d 575 (C. A. 6th Cir.); *Curtis* v. *A. Garcia y Cia.*, 241 F. 2d 30 (C. A. 3d Cir.); *O'Brien* v. *Luckenbach S. S. Co.*, 293 F. 170 (C. A. 2d Cir.); *Quinette* v. *Bisso*, 136 F. 825 (C. A. 5th Cir.); *The A. W. Thompson*, 39 F. 115 (D.C.S.D.N.Y.); but cf. *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, 73 N. E. 2d 718; *Kuhn* v. *City of New York*, 274 N. Y. 118, 8 N. E. 2d 300; *O'Leary* v. *United States Line Co.*, 215 F. 2d 708 (C. A. 1st Cir.).

Garcia, 257 U. S. 233; *Levinson* v. *Dupree*, 345 U. S. 648; cf. *Just* v. *Chambers*, 312 U. S. 383.

'[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State.' *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245. The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce at all; it may not pick or choose.

It is manifest, moreover, that acceptance of the respondent's argument would defeat the intent of Congress to preserve state sovereignty over deaths caused by maritime torts within the State's territorial waters. The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H. R. Rep.. No. 674, 66th Cong., 2d Sess. 3. The record of the debate in the House of Representatives preceding passages of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482-4486." (Italics added.)

More recently, the Second Circuit, in *Cunningham* v. *Rederiet Viadeggen A/S*, 333 Fed. 2d 308 (1964), Judge Waterman speaking held, page 313:

"• • • when an admiralty court adopts a state's right of action for wrongful death, the court is obliged to enforce that right subject to whatever conditions

> and limitations the state has attached to it. The *Tungus* v. *Skovgaard, supra,* 358 U. S. at 592, 79 S. Ct. at 506."

See also, *Williams* v. *Moran, Proctor, Mueser & Rutledge* (S.D.N.Y.—Sugarman, J.), 205 F. Supp. 208 (1962), page 216:

> "It is to be noted that in applying a state wrongful death act to a situation such as here presented, the federal courts will apply the state statute of limitations, *Western Fuel Company* v. *Garcia, supra.*"

Accord: *Allen* v. *U. S.* (C. A. 9), 338 Fed. 2d 160 (1964), in which an action for death occurring in a drydock was dismissed as not commenced within one year as required by the California death statute.

The courts have, without exception, applied the state statute of limitations when applying the state death statute.

Plaintiff cites *Hess* v. *U. S.,* 361 U. S. 314 and *Goett* v. *Union Carbide Corp.,* 361 U. S. 340. Neither case involved the question here. *Hess* v. *U. S., supra,* involved a question of whether the much broader Employer's Liability Act applied to maritime torts, it being held that plaintiff did not prove a cause of action under the Oregon Death statute.

Goett v. *Union Carbide Corp.,* 361 U. S. 340, held that the action should be remanded to the Court of Appeals to determine whether (1) the West Virginia Death Act included a recovery based upon unseaworthiness and (2) the district courts' finding of negligence was correct under the proven substantive law, neither of which questions was considered by the Court of Appeals in reversing the Dis-

trict Courts' award of $20,000, the monetary limit under the West Virginia Death statute.

It is especially significant to note that this Court did not in any way hold that the limit on damages in the West Virginia Act should not apply.

Justice Whittaker's dissent is supportive of respondent's position as is found on pages 346-348:

> "*It is true that when admiralty 'adopts' a State's Wrongful Death statute 'it must enforce* [*it*] *as an integrated whole, with whatever conditions and limitations* the creating State has attached.' The *Tungus, supra,* at 592. But the West Virginia Wrongful Death statute, like most such state statutes, apart from prescribing who may prosecute the action, *the time within which it must be brought,* and the measure and limit of recovery, has attached only the condition that the wrongful 'act, neglect or default, [be] such as would . . . have entitled the party injured to maintain an action to recover damages in respect thereof [if death had not ensued].' W. Va. Code, 1955, [5474] (5). Surely this means that the act, neglect or default, must be such as would, *under other laws*—whether common, statutory, or maritime laws—have entitled the party injured to recover damages in respect thereof 'if death had not ensued.'
>
> Adoption by admiralty of such a remedial statute cannot be permitted to, and does not, so expand the essential purposes and characteristic features of the general maritime law as to interfere with its proper nation-wide harmony and uniformity, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. By such adoption, admiralty takes over only the remedy afforded for death by the State's Wrongful Death statute—*albeit the whole thereof.* It does not thereby abandon the non-

conflicting substantive admiralty law which gave rise to the right of action that it would have enforced 'if death had not ensued.' In such a case, the real and substantive right in suit is still the one created by, and—to the extent not conflicting with the adopted State Wrongful Death statute—is governed by the maritime law.

This is what I understood the *Tungus* case to mean when I joined it, and re-examination of it confirms that conclusion. I submit there is not a word in it to the contrary. And this conclusion is buttressed by the separate opinion of my Brother BRENNAN in that case. Although this Court has many times and uniformly held that the maritime law creates no cause of action for wrongful death, and that, in circumstances like these, admiralty 'adopts' the State's Wrongful Death Act, the separate opinion in *Tungus* said, in effect, that admiralty would merely look to see whether the State had enacted a wrongful death statute and, if it had, would not 'adopt' that act but would put it aside and fashion its own remedy for wrongful death, 358 U. S., at 608-609, *which, I thought and still think, is contrary to this Court's cases holding that the maritime law does not create a cause of action for wrongful death and that, in actions for wrongful death arising on the territorial waters of a State, admiralty 'adopts' the State's Wrongful Death Act* cumo onere."

Plaintiff's argument was answered in *Curry* v. *Fred Olsen Line* (CA 9), 367 Fed. 2d 921 (1966), cert. den. 386 U. S. 971, in which it was held that the California Wrongful Death Act did encompass unseaworthiness and stated that the Court had applied the rule that when admiralty adopts the states right of action "it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attacked" (p. 923).

> "* * * Appellant [plaintiff], however, points to disagreements among the Justices of the Supreme Court, appearing in the opinion in The Tungus v. Skovgaard, supra, n. 6; United, N. Y. & N. J. Sandy Hook Pilot's Assn. v. Halecki, 1959, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541; Goett v. Union Carbide Co., supra, n. 6; and Hess v. United States, supra, n. 6, as to whether, once a right of action created by a state appears, the state's limitations upon it should also apply. Appellant suggests that it is likely that the Supreme Court will adopt the views expressed by Mr. Justice Brennan, dissenting in *The Tungus,* supra, that once the state affords a remedy in a general way for wrongful death then the right is governed by the general maritime law rather than state law. The foregoing decisions are to the contrary, and it is not our function to guess that the Supreme Court may overrule them and then to apply our guess instead of the rules announced in those decisions."

The cases of *Wilburn Boat Co.* v. *Fireman's Fund,* 348 U. S. 310; *The John G. Stevens,* 170 U. S. 113 and *United N. Y. & N. J. Sandy Hook Pilot's Assn.* v. *Halecki,* 358 U. S. 613, are not supportive of petitioner's argument.

In fact, the *Wilburn Boat* case is contra to petitioner's position. The case involved a policy of fire insurance on a vessel destroyed on navigable waters. This Court pointed out there was no maritime law regarding the validity of warranties in insurance contracts and that the Texas law applied.

The *John G. Stevens* case involved the priority of maritime liens, while in the *Halecki* case, this Court applied the New Jersey Death Act.

Just v. *Chambers,* 312 U. S. 383, involved death in Florida waters, but limited recovery to the value of the vessel, pointing out that the personal liability of the owner

did not survive the death of the injured man. This Court pointed to *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, that the action was barred by limitations and answered the petitioner's argument of lack of uniformity (p. 392):

> "Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. * * *"

In *Chelentis* v. *Luckenbach S.S. Co.,* 247 U. S. 372, this Court, at page 382, clearly states that the uniformity sought in maritime law is that of *commercial* character affecting the intercourse of States with each other or with foreign states.

Moreover, that the "saving clause" is of common law remedies, where the common law is competent to give it (p. 383). This is not a common law remedy nor a common law right.

In *Riley* v. *Agivilines, Inc.,* 296 N. Y. 403, the complaint was dismissed on the ground that no negligence or unseaworthiness was proved, the question being one of the liability of a vessel owner to a longshoreman.

In *Kuhn* v. *City of New York,* 274 N. Y. 111, the applicability of the New York Death Act was never questioned, the only question being the basis of liability, viz., whether the safe place to work doctrine applied to a maritime tort.

If it were intended that everyone killed upon navigable waters were to have the same rights, etc., the Congress could have so provided as it did in the Jones Act, 46 USCA

688 *et seq.*, as to seamen's rights against their employer or in the Death on the High Seas Act, 46 U.S.C.A. 761 *et seq.* but it has not done so, despite this Court's unequivocal statements in the *Garcia, The Harrisburg* and *Tungus* cases, applying the full corpus of the state death act.

CONCLUSION

It is respectfully submitted, that the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

DANIEL M. SEMEL, Esq.,
Attorney for
Third-Party Respondent.

JOHN NIELSEN,
of Counsel.